82-1149

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1982

ALONZO MARQUEZ,

Petitioner,

v.

UNIVERSITY OF WASHINGTON; JOHN HOGNESS, President of the University of Washington; RICHARD RODDIS, Dean of the School of Law; and BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON,

Respondents.

Petition for Writ of Certiorari to The Court of Appeals for the State of Washington

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QUESTIONS PRESENTED 1/

1. Did the Washington State Appellate Court err in holding that the Respondents' Affirmative Action Program did not discriminate against petitioner as to race or otherwise unfairly treat Petitioner?

2. Did the Washington State Appellate Court err in holding that Petitioner's Equal protection rights were not violated under the Fourteenth Amendment to the United States Constitution?

3. Did the Washington State Appellate Court err in holding that Petitioner's Affirmative Action contract was not breached by Respondents?

4. Did the Washington State Appellate Court err in holding that summary judgment without a trial on the merits was the appropriate procedural method of dealing with these issues?

1/ A listing of names of all parties to this proceeding is included in the caption of this case.

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Alonzo Marquez, petitioner herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the State Court of Appeals for the State of Washington filed and entered in the above entitled cause on May 17, 1982.

OPINIONS BELOW

In 1978 the respondents moved for Summary Judgment. The Honorable Gerald M. Shellan of the King County Superior Court, thereafter, on April 17, 1978, granted the respondents motion for Summary Judgment. The opinion is reproduced herein as "Appendix A" to this petition.

On April 30, 1979, the Court of Appeals, Division I of the State of Washington, reversed Judge Shellan's order. The opinion was unpublished and is reproduced herein as "Appendix B" to this petition.

The respondents again renoted the motion for Summary Judgment in Judge Shellan's Court and on December 31, 1979, he orally granted Summary Judgment again, but stayed his decision for ninety days to permit some deposition discovery. Thus, on July 8, 1980, Judge Shellan entered an order incorporating by reference his December 31, 1979 oral opinion and granting respondents' motion for Summary Judgment. The opinion is reproduced herein as "Appendix C" to this petition.

On July 21, 1980, petitioner filed his appeal and on May 17, 1982, the State Court of Appeals of the State of Washington affirmed. The opinion is reported as 32 Wn. App. 302, and is reproduced herein as "Appendix C" to this petition.

Motion for Reconsideration of said decision was denied June 16, 1982, and is reproduced herein as "Appendix C" to this petition.

A Petition for Review of the said decision was denied October 8, 1982 by the Supreme Court of the State of Washington, and is reproduced herein as "Appendix D" to this petition.

JURISDICTION

The judgment of the State Court of Appeals of the State of Washington was made and entered on May 17, 1982. The petitioner herein filed a Motion for Reconsideration but was denied June 16, 1982 and a Petition for Review was filed with the Supreme Court of the State of Washington and was denied October 8, 1982.

The opinion below decides and applies important questions of federal and state law that is contrary to this Court. The opinion presents important questions of first impression, which until now has not been, but ought to be, decided by this Court. On this basis, petition is made to this Court prusuant to 28 U.S.C.A. Section 1257 and

U.S. Supreme Court Rule 17, for Certiorari to review the opinion below.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution states in part;

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 12 of the Washington Constitution states;

§ 12. Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Revised Code of Washington (R.C.W. 49.60) states in part;

49.60.010 Purpose of chapter

This chapter shall be known as the "Law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

49.60.030 Freedom from discrimination—Declaration of civil rights

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions without discrimination. *Provided*, That a practice which is not unlawful under RCW 48.30.300 or 48.44.220 does not constitute an unfair practice for the purposes of this subparagraph; and

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, national origin or lawful business relationship: *Provided however*, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices.

(2) Any person deeming himself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover the actual damages sustained by him, or both, together with the cost of suit including a reasonable attorney's fees or any other remedy authorized by this chapter or the United States Civil Rights Act of 1964; and

(3) Notwithstanding any other provisions of this chapter,

any act prohibited by this chapter related to sex discrimination or discriminatory boycotts or blacklists which is committed in the course of trade or commerce in the state of Washington as defined in the Consumer Protection Act, chapter 19.86 RCW, shall be deemed an unfair practice within the meaning of RCW 19.86.020 and 19.86.030 and subject to all the provisions of chapter 19.86 RCW as now or.

The United States Civil Rights Act of 1964.

STATEMENT OF FACTS

Plaintiff Alonzo Marquez is a resident of Washington and is of Mexican-American descent. Respondent University of Washington is an agency of the State of Washington. Respondents John R. Hogness and Richard P.L. Roddis were employees of the University responsible for its administration and the administration of the University of Washington School Law (hereinafter "the law school"). Respondents Board of Regents of the University of Washington are the duly constituted governing authority for respondent university.

The law school is a division of respondent university. The law school is the only public school of law in the state. Applications for admission for the 1972-1975 school year outnumbered available positions by about ten to one. Students were selected on the basis of several factors, particularly their Law School Admissions Test (LSAT) scores and their undergraduate grade point averages (hereinafter "GPA"). By using these two indicators, the law school derived a predicted first year averages (hereinafter "PFYA") for each applicant.

In order, among other reasons, to achieve a reasonable representation within the student body of historically disadvantaged minority groups, and in order to increase the number of minority attorneys practicing in Washington, the law school established an affirmative action program.

Under the affirmative action program, minority applications have been and are being accepted to the law school with PFYA's significantly lower than those of caucasian students.

Petitioner was accepted into the 1972-1973 entering class under the affirmative action program with a PFYA of 66.68. There were 22 special admittees in that class, that is, students admitted under the affirmative action program. All were minorities.

The law school required at that time that students attain a GPA of 68.00 their first year in order to remain in school. Petitioner's cumulative first year GPA was 63.94. At the completion of his first year, petitioner was one of 12 students in the class who achieved averages below 68.00. All 12 were special admittees. There were two students with averages lower than petitioner's.

The law school faculty decided on the recommendation of respondent Roddis to conditionally reinstate or continue all the students who achieved averages below 68.00. Four students, including petitioner, who were initially informed they were terminated, were required to repeat all courses in which they received a grade below 68.00. The other eight students whose averages were below 68.00 were not required to repeat any courses, but were allowed to repeat any course and receive the second grade. No caucasian students were required to repeat any courses, regardless of the grade received, however they were also allowed to repeat courses and receive the second grade.

A condition of petitioner's reinstatement was that he achieve a cumulative GPA of 68.00 at the end of the 1973-1974 school year. Failure to do so was to result in automatic dismissal for low scholarship. The same condition and ultimatum was imposed by respondents on the other three students. The same ultimatum was imposed on the eight students who achieved GPA's below 68.00.

At the end of his second year of law studies (1973-1974), petitioner had a cumulative GPA of 67.725. Since his averages was below 68.00, he was terminated. However, until that year GPA was computed by "rounding-off" to the nearest whole number to determine whether a student had achieved a satisfactory average. In preceding years other students, after their year of law studies, who had cumulative GPA's below 68.00 were rounded-off to 68.00. These students were retained by the law school. Petitioner was the only student in the position to use the rounding-off policy in 1973-1974 school year.

One other student who had been required to repeat courses was also terminated. No other students were terminated for low scholarship. There was another student admitted to the law school at the same time he was, who was also conditionally reinstated or continued at the end of the 1972-1973 school year, and who, at the end of the 1973-1974 school year had a cumulative GPA below 68.00 and below petitioner, but was not terminated. This student was also Mexican-American.

In May 1974, prior to informing petitioner, that he was terminated from the law school, respondents agreed to permit petitioner to attend classes during summer quarter 1974. Petitioner wanted to improve his GPA and increase his total number of credits. Respondents further agreed that summer credits would count as residence credits and that grades earned would be used in computing petitioner's GPA.

On or about August 15, 1974, respondents informed petitioner that he was to be terminated from the law school and that any grades earned during summer quarter would not count toward the calcula-

tion of his GPA and thus could not be used to raise petitioner's averages.

Dean Hunt did not follow established procedures when he terminated petitioner during the summer school quarter. He did not use the Rules for Retention and Readmission adopted by the faculty and Deans in May 21, 1974, which stated in a nutshell;

> in the case of minority students who are not meeting normal graduating requirements, the presumption shall be that the student will be retained and the risk is justified because of the need of the minority lawyers in the profession.

Instead, Dean Hunt used a guideline adopted by the same faculty and Deans on August, 1973 and dropped thereafter.

Dean Hunt admits using the May 21, 1974 Rule on the one Mexican-American student who had a lower grade point average than the petitioner and who was not terminated.

Furthermore, Dean Hunt did not follow the established Law School Scholarship and Conduct Rules, which state;

> by petitioner being allowed to attend summer school, he was granted permission to continue into the third year because the academic year includes summer, autumn, winter, and spring quarter. He should have not been terminated until spring quarter of the next year.

Thus, the law school should have allowed petitioner to complete the summer school quarter and allow the grades to count. He petitioned for reinstatement on October 2, 1975, the petition was denied by a vote of the faculty on October 7, 1975.

A source of petitioner's failure to do well academically at the law school was the very serious health problems he suffered while enrolled. He repeatedly asked respondents for a leave of absence. These requests were always denied. Other students had requested and been granted leaves of absence for health reasons during their first year at the law school.

In the 1972 University of Washington Bulletin and in the Pre-Law Handbook, their Affirmative Action program promised special academic aid to specially admitted law students. The Pre-Law Handbook stated that, "Special programs—including recruitment, admission, and financial and academic aid—are available for students of minority ethnic groups." Petitioner was induced, in part, to attend the law school by the agreement that academic aid would be provided. The law school in fact had no such program. Petitioner was not able to perform satisfactorily in his first year studies without special academic aid, and respondents knew this. Petitioner repeatedly requested such aid from the law school administrators. He was told

that various faculty members offered office hours, but that academic aid (also known as formal tutorial aid) was not available for petitioner or other special admittees.

In November 1977, petitioner filed an amended complaint against respondents claiming that the law school had breached contractual agreements with him, denied him equal protection of the law under the State and Federal Constitutions, and violated the State Anti-Discrimination Statute, RCW 49.60 and he sought readmission, $250,000 damages, attorney's fees and costs.

In 1978 the respondents moved for summary judgment. The Honorable Gerard M. Shellan of the King County Superior Court, thereafter, on April 17, 1978, granted the respondents motion for summary judgment. (See Appendix A)

On April 30, 1979, the Court of Appeals, Division I, reversed Judge Shellan's Order. (See Appendix B)

The respondents again renoted the motion for summary judgment in Judge Shellan's Court and on December 31, 1979, he orally granted summary judgment again, but stayed his decision for ninety days to permit some deposition discovery. Thus, on July 8, 1980, Judge Shellan entered an order incorporating by reference his December 31, 1979 oral opinion granting respondents' motion for summary judgment. (See Appendix C)

On July 21, 1980, petitioner filed his appeal and on May 17, 1982, the Court of Appeals affirmed the lower court. The Court concluded that the trial court did not err in granting summary judgment on the contract claims because the uncontroverted facts establish that the University of Washington School of Law did not breach its educational contract with petitioner, the record also does not establish or raise an inference of arbitrary and capricious action on the part of the University, the trial court did not err in granting summary judgment on the equal protection claim and lastly, the trial court did not err by granting summary judgment on the discrimination claim because there is no evidence whatsoever that the University discriminated against petitioner or treated him unfairly. (See Appendix D)

Petitioner filed a Motion for Reconsideration and it was denied June 16, 1982.

Petitioner then filed a petition for review on July 16, 1982 but was denied on October 8, 1982 by the State Supreme Court.

ARGUMENT FOR GRANTING THE WRIT

Additional reasons for granting this writ have been mentioned above and will not be repeated in this section.

(a) The Washington State Appellate Court has decided an im-

portant question of first impression, which until now has not been, but ought to be, decided by this Court.

The Revised Code of Washington (R.C.W. 49.60) and the United States Civil Rights Act of 1964 as referred to by said state statute prohibits discrimination by the law school against students because of their race.

Petitioner's legal theory may be simply expressed. Under the special admissions program, which was part of their affirmative action program, the law school recruited and admitted petitioner and other minority students who had lower undergraduate GPA's, LSAT scores, and Predicted First Year Averages than regularly admitted students. Petitioner's Predicted First Year Average was 66.8, below the 68.0 required to graduate. Respondents knew that petitioner and other specially admitted students would not be able to achieve satisfactory grades without special assistance. Despite this fact, they failed to provide *any* special program of academic aid for those students who had been specially admitted.

Petitioner and all other specially admitted students are ethnic minorities. By failing to provide any program for academic assistance for those students, the law school virtually guaranteed that petitioner and other specially admitted students would not be able to achieve satisfactory grades. They also virtually guaranteed that specially admitted students would have a very difficult time passing the bar exam and being admitted to the practice of law. The only people affected by this failure on the part of the respondents were specially admitted minority students, including petitioner. For this reason, the law school discriminated on the basis of race in violation of the R.C.W. 49.60 and the United States Civil Rights Act of 1964.

The effectiveness of the law school's special admissions program is, thus, of critical importance to petitioner's case. To the knowledge of the undersigned, this is a case of first impression, both in the State of Washington and elsewhere. Petitioner maintains that, since the effect of the inadequate program is felt only by racial minorities, it is impermissible race discrimination.

The Washington Supreme Court has determined that it is constitutional for the law school to institute an affirmative action program. *Defunis v. Odegaard*, 82 Wn. 2d 11 (1973). *Vacated as moot and remanded*, 416 U.S. 312, *No action on remand*, 84 Wn. 2d 617, 529 P. 2d 438 (1974). Also in *University of California Regents v. Bakke*, 438 U.S. 265, 57L Ed 2d 750, 98 S Ct 2733, Mr. Justice Powell suggests in announcing the judgment of the court that affirmative action programs that have race-conscious admissions policies are constitutional and did not necessarily violate Title VI of the Civil Rights Act of 1964. Mr. Justice Marshall, in a separate opinion,

also suggests that affirmative action programs should not be held to be unconstitutional.

In the trial on the *DeFunis* case, Dean Roddis testified concerning the importance of seeking a representation in the law school of students from minority groups. He stated that the presence of students from minority groups is important to the educational environment of a law school, and important to providing legal representation for those alienated from the legal system.

The *DeFunis* decision at page 33, also recognized the basic reasons for seeking to increase minority enrollment at the law school:

> It can hardly be gainsaid that the minorities have been, and are, grossly underrepresented in the law schools—and consequently in the legal profession—of this state and this nation. We believe the state has an overriding interest in promoting integration in public education. In light of the serious underrepresentation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling.

It is not enough simply to make special efforts to admit minority students to the law school, however. For the opportunity to be meaningful and to maximize the possibility that the specially admitted minority student will one day become a practicing attorney, it is necessary to provide special academic assistance after the student is admitted. At the trial in *DeFunis*, then President Odegaard testified and recognized the importance of "a certain amount of tutorial guidance and counseling" in developing successful specially admitted students.

When the special admissions program fails to provide special academic assistance, as it did in this case, it is virtually the same as having no special program at all. This is only one step removed from the situation whereby minorities are admitted and then provided no education. Such a situation is clearly not permissible.

(b) The standards applied by this court were not correctly applied by the Washington State Appellate Court.

The Washington State Appellate Court has also decided an important question of Federal Law such as to bring that court into apparent conflict with a decision of this Court on the same matter. The question alluded to is: Whether petitioner's equal protection rights were violated?

The standards applied by this Court in *Reed v. Reed*, 404 U.S. 71, 75-76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971); were not correctly applied by the Washington State Appellate Court.

Petitioner agrees that the test to be applied here is that expressed in *Reed:*

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' 404 US. . at 76.

The "classification" here is the difference in treatment accorded to petitioner and to others similarly situated. The question then becomes whether this difference is reasonable as opposed to arbitrary, and whether it has a fair and substantial relation to a legitimate objective.

In this claim arbitrary, capricious or bad faith treatment by the Respondents against Petitioner were shown. One only has to look at the treatment accorded by Dean Hunt to petitioner and another specially admitted student at the end of the 1973-74 school year. Student number 16 and petitioner were continued after the first year on essentially identical terms, 1) they were both required to bring their cumulative GPA to 68 at the end of the second year or be dropped, 2) each were allowed to retake courses. At the end of the 1973-74 school year petitioner had a GPA at 67.725 and student number 16 had a GPA at 67.13. Student number 16 was allowed to continue and petitioner was dropped.

Dean Hunt admits *not* using the established Rules for Retention and Readmission adopted by the faculty and Deans in May 21, 1974 to determine whether petitioner should be terminated, however, he used the established rules on Student number 16. This distinction, between two people similarly, "circumstanced," does not withstand the examination required by *Reed, Supra.* Dean Hunt deviated from established procedures with no rational basis, and, in doing so, provided different treatment for the two students equally situated. This distinction was arbitrary and not rationally related to legitimate interests of the law school.

Furthermore, the termination of the rounding-off policy was felt solely by petitioner in the 1973-74 school year. The reasoning in terminating the policy was not rationally related to legitimate interests of the law school, but, one of individual dislikes of a policy that would possibly benefit minority students. The reason given for terminating the policy, that, "it was not on line with their wishes", is not what a rational person, given faculty status in a non-minority situation, would concur with. The faculty abused their discretion by acting in bad faith an arbitrary. This was not a reasonable exercise of their educational responsibility.

(c) The contract law standards applied by the 10th Cir. were

incorrectly applied by the Washington State Appellate Court.

This case has an immediate impact according to law on hundredth of thousands of students in Washington and throughout the United States attending post-secondary educational institutions.

Certainly, the contractual relationship between student and his institution has been judicially acknowledged, as shown by the citations in the opinion of the Washington State Court of Appeals, Appendix D, but elaborations such as furnished in the Washington State Appellate Court's opinion in this case has first impressions as to *Affirmative Action Programs* and their contractual implications.

When petitioner applied and was admitted to the University of Washington Law School, as an ethnic minority, the law school's Pre-Law Handbook of the Association of American Law Schools provided, in part;

> Special Programs—including recruitment, admission and financial and *academic aid*—are available for students of minority ethnic groups.

The above language became part of the contract, the law school breached that agreement, by not providing what was publicized in their Pre-Law Handbook, that is, a formal tutoring program for Special Admittees. This publicized Special Program was in practice prior to petitioner's first year and continued to be publicized but not practiced during two and a third years petitioner was a student at the law school.

The Washington State Appellate Court concluded that the Pre-Law Handbook did no more than announce that certain "programs" including "academic aid" to certain prospective students "are available". Furthermore, it did not tie the law school to a specific program or type of "academic aid". (See Appendix D at 4 and 5)

The Washington State Appellate Court's decision to modify the contract by changing the word of *Special* to *Certain* does not withstand the standard, upheld by *Slaughter v. Brigham Young Univ.*, 514 F. 2d 622, 627, (10th Cir.), *Cert. denied*, 423 U.S. 898, 46 L. Ed. 2d 131, 96 S. Ct. 202 (1975); where it states a "Court cannot so modify the student code." The same should be held for this case that is, the court cannot modify the law school Affirmative Action Contract with petitioner, nor its rules-regulations-policies-publications.

The law school is bound to adhere to the special programs published in their Pre-Law Handbook. The Special Academic Aid Program meant a formal structurized tutorial assistance program.

The key word is *Special*, which means:

"relating to or designating a species, kind, individual, thing, or

sort: designed for a particular purpose; confined to a particular purpose, object, person, or class. Unusual, extraordinary." *Black's Law Dictionary* at 1569 (4th Edition) (1968).

Special is different from certain and it establishes a specific type of academic aid or unusual type of academic aid.

Petitioner came to this law school relying on the representation and agreement that Special Academic Aid would be available. The subsequent acts of respondents indicated that they knew of this agreement, but did nothing to fulfill it. At the end of petitioner's first year the faculty voted down a program which would have provided special tutoring, at least for those in academic trouble. It was not until May 14, 1974 that Dean Roddis proposed a program of Special Academic Aid. Such a program was implemented for fall quarter 1974. It should be noted that the improvement in the performance of Specially Admitted Students corresponds with the start of this program.

The same said argument should be used to contradict the decision of the Washington State Appellate Court when it decided that there was no separate agreement to permit petitioner to attend 1974 summer quarter and have his grades count toward his cumulative grade point average. (See Appendix D at 7) Again the Washington State Appellate Court modified our agreement by not allowing this part of the agreement to be enforceable.

(d) Did the Washington State Appellate Court err in holding that summary judgment without a trial on the merits was the appropriate procedural method of dealing with these issues?

On review, the United States Supreme Court will look at record on summary judgment in light most favorable to party opposing motion for summary judgment. *Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, 7L Ed. 2d 458, 82 S Ct 486.

The Washington State Appellate Court did not comply with Rule 56 of Civil procedure because said Court did not resolve whether there were no genuine issue of material fact as to all the issues. *Gavin v. Peoples Natural Gas Co.* (1980 CA3 Pa) 613 F2d 482.

It was the duty of said court to take everything in record (pleadings, depositions, interrogatories, affidavits) to demonstrate that no genuine issue of material facts exists. *Keiser v. Coliseum Properties, Inc.* (1980, CA5 Ga.) 614 F2d 406.

There were factual issues that were unresolved such as special academic aid, race discrimination, contracts, equal protection, modification of the contract, reasonable and expectations standards, and an expert opinion concerning ambiguity in the contract. Furthermore, other facts concerning whether the respondents adhered to es-

tablished rules, regulations, policies and publications were either overlooked or totally ignored.

These factual issues are which the outcome of this litigation depends in whole or in part. *Balise v. Underwood,* 62 Wn. 2d 195, 381 p. 2d 966 (1963).

The Washington State Appellate Court's omission of the above factual issues released respondents from their burden to show that there is no genuine material issue of fact. *Quadra v. Superior Court of San Francisco* (1974, DC Cal) 378F. Supp. 605. So, all reasonable inferences from the evidence were not resolved against respondents. *Barber v. Bankers Life and Gas Co.,* 81 Wn. 2d 140, 500 p. 2d 88 (1972).

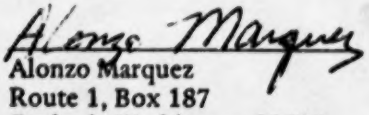
Thus, the said court did not adhere to its duty to view all evidence and reasonable inferences there from in a light more favorable to petitioner. *Sommer v. Hilton Hotels Corp.* (1974, DC NY) 376 F. Supp. 297. *Balise, Supra.*

Summary judgment should not have been granted because the entire record did not show the right to judgment with such a clarity as to leave no room for controversy and it did not establish affirmatively that petitioner cannot prevail under any circumstance. *Prince v. Pittston Co.* (1974, DC W Va). 63 FRD 28.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated this 27th day of December, 1982.



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APPENDIX TO

Petition For Writ of Certiorari to the Court of Appeals of the State of Washington.

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